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J. Richard Collins, Esq.
Monroe County Attorney
HAND-DELIVERED

Re: Potential liability for short-term moratorium

Dear Mr. Collins:

Monroe County Growth Management Division has informed us that Monroe County is contemplating adoption of an ordinance (the "Moratorium Ordinance") that would establish a moratorium of short duration (*i.e.*, not exceeding one year) on the issuance of ROGO/NROGO allocations involving clearing of "high quality hammock" lands within Conservation and Natural Areas. We have been directed to render to you our legal opinion concerning Monroe County's potential liability for enactment of the Moratorium Ordinance, under both the Bert J. Harris, Jr. Private Property Rights Protection Act (F.S. § 70.001; "the Harris Act") and the provisions of the U.S. and Florida Constitutions requiring just compensation for governmental actions that "take" real property ("takings").

Our opinion is based on the premise that the Moratorium Ordinance will include the following provisions, the absence of which might subject the Moratorium Ordinance to potentially successful challenge:

1. Proper purpose: the purpose of the Moratorium Ordinance must be legally justifiable, *e.g.* interim protection of environmentally sensitive lands for the minimum period required for the drafting and adoption of land development regulations restricting development of those lands and assuring just compensation for owners of lands that may be rendered unbuildable by those regulations. Because there would be takings implications if the County were to adopt a moratorium solely to gain sufficient time to acquire those lands, we recommend that the Moratorium Ordinance expressly disclaim such a purpose¹. The Resolution

¹ This would make it clear that the County is acting for reasons other than effectuating DCA's recommendation that the County "protect high quality habitat until acquisition funds become available."

should also state the reasons that these particular lands are being subjected to the moratorium (*i.e.*, their unique habitat and environmental values) to the exclusion of other lands (*e.g.*, wetlands are already adequately protected).

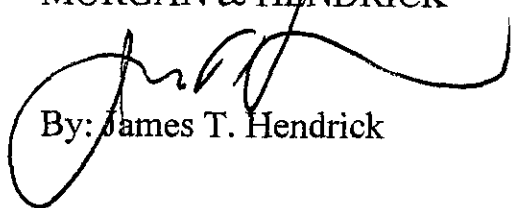
2. Administrative relief: in order to afford relief to any property owner who might have a legitimate basis for vested rights, and to deter unfounded judicial challenges to the Moratorium Ordinance, the Moratorium Ordinance should include an administrative procedure for determination of vested rights. Although GMD staff is of the opinion that there are few, if any, potential applicants for such relief, the existence of an administrative remedy will afford dual protection for property rights and against spurious litigation.
3. Clear definitions: to assure due process, a precise description of those lands subject to the Moratorium Ordinance is essential.
4. Limited term: takings jurisprudence holds that moratoria of short duration (such as 6 months to a year) do not constitute a categorical taking. As noted below, the Harris Act excludes temporary measures such as short-term moratoria.

Provided that the above recommendations are included in the Moratorium Ordinance, and that the Ordinance is enacted in accordance with the provisions of Florida law and Monroe County LDRs, we are of the opinion that the adoption of the Moratorium Ordinance will not subject Monroe County to substantial risk of an adverse judgment under either the Harris Act or takings litigation. As the BOCC has previously been advised, the Harris Act expressly excludes liability for "temporary impacts to real property" F.S. § 70.001(3)(e). That exclusion encompasses the Moratorium Ordinance. The United States Supreme Court's *Tahoe* decision holds that moratoria complying with the above recommendations do not constitute a categorical taking. Although it is theoretically possible that an affected property owner could allege an as-applied taking, the prospect of recovery under such a theory is remote, because a short-term moratorium would not strip the property of essentially all value.

We will be pleased to address the BOCC on the subject of this letter, at your direction.

Sincerely,

MORGAN & HENDRICK



By: James T. Hendrick